COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc., d/b/a Verizon Massachusetts' provision of Special Access Services.	D.T.E. 01-34

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.'S

RESPONSE TO VERIZON'S COMMENTS

AT&T Communications of New England, Inc., on behalf of itself and its affiliated entities that provide telecommunications services in Massachusetts ("AT&T"), hereby submits this response to the comments of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon"), regarding AT&T's motion to expand the Department of Telecommunications and Energy's ("Department") investigation of performance with respect to Verizon's special access service offerings in Massachusetts. After reviewing the submissions from all of the parties, the Department should grant AT&T's motion because it received support from every party which submitted comments, other than Verizon, and - as explained below - Verizon provided no valid factual or legal reason why the Department should not exercise concurrent jurisdiction to include an investigation into special services ordered under both the state and federal tariffs.

Argument

THE DEPARTMENT HAS THE AUTHORITY TO INVESTIGATE VERIZON'S PERFORMANCE WITH RESPECT TO ALL SPECIAL ACCESS OFFERINGS IN MASSACHUSETTS, INCLUDING THOSE PROVISIONED UNDER THE FEDERAL ACCESS TARIFF.

A. The Department Has Concurrent Jurisdiction Over The Quality of All Of Verizon's Intrastate Special Access Traffic, Even Where The Percentage Of Interstate Traffic Over Circuits Exceeds 10 Percent.

AT&T does not dispute the fact that the Federal Communications Commission ("FCC") also has jurisdiction and authority to regulate Verizon's special access and special service offerings where the interstate traffic over circuits exceeds ten percent. But Verizon incorrectly argues that the FCC has exclusive jurisdiction over such mixed use services and therefore that state commissions may not exercise their own authority with respect to such services. Verizon provides absolutely no legal support for that proposition. Instead, it cites to a string of old federal cases that all involve parties challenging jurisdiction over certain facilities used for interstate communication, and cites to decisions and the regulation implementing the ten percent rule. See Verizon's Comments at 8-9. This authority does nothing to undermine the fact that the Department has concurrent jurisdiction over all special access services where up to 90 percent of the traffic over the circuits is intrastate.

Federal law expressly contemplates the exercise of state regulatory authority over mixed-use access facilities such as those involved in special access. The Supreme Court recognized this fact in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), holding that states have overlapping jurisdiction with the FCC to regulate facilities that serve both interstate and intrastate. This fact is confirmed in the 1996 Telecommunications Act ("Act"), which provides in relevant part that:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of ... exchange services, as long as the State's requirements are not inconsistent with this part of the Commission's regulations to implement this part.

47 U.S.C. § 261(c). Similarly, 47 U.S.C. § 253(b) recognizes "the ability of the State to impose … requirements necessary to … ensure the continued quality of telecommunications services, and safeguard the rights of consumers," provided that the requirements are competitively neutral and otherwise consistent with Section 254 of the Act.

Given the fact that up to 90 percent of the traffic over the special access circuits under the federal tariff is intrastate, federal law clearly contemplates and expressly reserves to the States the authority to regulate that service as long as it does not conflict with the FCC's regulations and is not anticompetitive. If the Department failed to act on this grant of concurrent jurisdiction, it will effectively limit its investigation in this docket to the small fraction of orders not steered by Verizon to fall under the federal tariff. The Department will therefore be unable to either address or resolve in a meaningful way the critical problems faced by competitive carriers and their customers in Massachusetts.

B. The FCC's Regulation Of Special Access Does Not Preempt The Department's Regulation Of Those Services.

According to Verizon, the simple fact that the FCC has asserted jurisdiction over special access services so long as ten percent or more of the traffic is interstate "necessarily preempts state regulation of the quality of those services." Verizon's Comments at 10. In support of its conclusion, Verizon points to two sources: the FCC's Massachusetts 271 Order and several federal cases. Neither source is decisive.

First, Verizon asserts that the FCC's statement that parties "experiencing problems in the provisioning of special access services ordered from Verizon's federal tariffs … are appropriately addressed in the Commission's section 208 complaint process." Id. at 11. As PaeTec Communications and Allegiance Telecom point out in their support for AT&T motion to expand the Department's investigation, those paragraphs only address the fact that such problems, if they are to be addressed by

the FCC, should be considered in a Section 208 rather than a Section 271 proceeding. There is absolutely no support for Verizon's supposition that a Section 208 proceeding is the exclusive remedy for special access provisioning problems affecting intrastate traffic carried on a circuit procured under federal tariff.

Second, both cases cited by Verizon stand for the proposition that FCC regulations preempt inconsistent state regulation. See id. Indeed, one of the cases cited by Verizon states that "the only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." NARUC v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (emphasis in original). Verizon has not identified any actual, imminent or concrete conflict between the Department's exercise of jurisdiction over special access, and certainly failed to explain how action by the Department would negate the FCC's authority over interstate communication.

As AT&T noted in its motion, a proper preemption analysis should be conducted with the following factors in mind set forth by the U.S. Supreme Court:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the State to supplement federal law, or . . . or where the state law stands as an obstacle to accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Commission, 476 U.S. at 368-69 (citations omitted). The Minnesota PUC correctly applied these factors to this exact special access issue, finding that: (1) there was no clear expression of Congressional intent to preempt state law but rather that Congress contemplated concurrent jurisdiction; (2) there is no federal law with which any intrastate service quality directive issued by a state commission could conflict; and (3) that there was no intent to occupy the field and no action taken by a state commission to regulate service quality could be seen as an obstacle to FCC objectives. See In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U.S. West Communications, Inc. Regarding Access Service, 2000 Minn. PUC LEXIS 53 (Docket No. p-421/C-99-1183; August 15, 2000). Consequently, the Department is not preempted by federal law from regulating the quality of provisioning for intrastate access traffic where state law authorizes the Department to do so, even if the intrastate access traffic happens to travel over a circuit ordered under a federal tariff.

Conclusion

Because the Department has the jurisdiction and the strong public policy interest in investigating Verizon's performance in provisioning both intrastate and interstate access, the Department should grant AT&T's motion to expand the scope of this proceeding to monitor Verizon's performance with respect to all intrastate traffic carried over special access arrangements - without regard to whether it is priced under state or federal tariff - and to establish performance standards and incentives to ensure that Verizon ceases undue or unreasonable preference or discrimination in the provision of special access services whether provided pursuant to state or federal tariff.

Respectfully submitted,

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